No. 99-271

IN THE

Supreme Court of the United States

CITY OF NIAGARA FALLS, NEW YORK, LAUREL SHEEHAN, THOMAS ZWELLING and NIAGARA FALLS POLICE DEPARTMENT,

Petitioners,

v.

BARBARA CAPTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

As detailed below, there is no cause for this Court's review of the Petitioners' position, which has been rejected by the U.S. Court of Appeals for the Second Circuit in its unanimous Summary Order filed March 2, 1999. Moreover, Petitioners' application for a Rehearing and Rehearing *en banc* was denied by the Second Circuit on May 19, 1999.

A. The Court of Appeals properly ruled that prior civil rights violations did not have to be proven in this case.

The Court of Appeals, by affirming the judgment against the City, agreed with the District Court and the jury determination that the City and its police department evidenced a practice and custom of deliberate indifference to Barbara Capton's statutory and constitutional right to be free of police excessive force, through its failure to properly investigate and appropriately discipline instances of alleged excessive force over a number of years.

The Petitioners have mischaracterized the jury verdict, since it did not necessarily find that Mrs. Capton's injuries were proximately caused by Petitioners' custom, policy or practice of deliberate indifference *to the police department's civil rights violations*. The deliberate indifference was to Mrs. Capton's constitutional right to be free of the exercise of excessive force by police. In this particular case, it was claimed on behalf of Mrs. Capton that the Petitioners' custom, policy and/or practice of deliberate indifference was characterized by a lack of any recognizable departmental policy relating to investigating allegations of the use of excessive force. The police department routinely failed to

investigate allegations of excessive force, and there was never one instance of even token discipline resulting from any investigation, purely and simply because investigation was threadbare or non-existent. An official "head in the sand" approach to past allegations of use of excessive force was a predictable precursor of the Capton tragedy.

Despite the lapse of almost three years and two unsuccessful attempts to alter the verdict, Petitioners continue to either misunderstand or misconstrue the Respondent's theory of liability, which has been upheld by the U.S. District Court, the U.S. Court of Appeals and perhaps most importantly, the jury. Petitioners have been held liable for the injuries to Barbara Capton not because "the Respondent could establish the City's deliberate indifference to civil rights violations without proving that any such violation had ever occurred" (see Petitioners' Statement of the Case, p. 5) but because the Respondent established by a preponderance of the evidence that the Petitioners were deliberately indifferent to Mrs. Capton's right to be free of excessive force by so blatantly ignoring their duty to investigate and correct, where necessary, past instances of the use of excessive force by its police officers for more than a decade, as the evidence amply demonstrated.

Respondent's theory of culpability was not necessarily that prior civil rights violations had occurred to which the Petitioners had been deliberately indifferent but that the Petitioners had (a) never bothered to investigate numerous allegations of civil rights violations; or (b) if a rare need rudimentary investigation was conducted, no action ever resulted; and (c) no one was ever disciplined as a result of any substantiated accusation.

As stated by the trial court after reviewing appropriate authorities:

> There is no need to know the ultimate disposition of the claims and complaints. . . . They do not need to be connected to individual officers, at least in terms of further identification on the issue of notice to the municipal defendant. I have looked at the *Monell* case and how that was viewed in terms of the issue before me. In *Fiacco*, the jury was instructed to disregard any concerns for the truth or falsity of the complaints themselves and *focus on the sufficiency of the steps taken to respond to claims, regardless of their validity*. . . . That was *Fiacco* at page 328, *cert. denied* 480 U.S. 922. Also, I point out that the Second Circuit noted with approval the District Court's repeated instructions on the limited purpose for which prior claims were admitted and the efforts the trial court took to prevent the jury from knowing or considering whether the allegations in the prior claims had any truth (Post Trial Decision and Order, A-64).

Petitioners incorrectly state that the City did not seek to entirely exclude proof of past instances of civil rights violations in support of Respondent's deliberate indifference claim. (Petitioners' motion in limine dated December 11, 1996, in paragraph 5 of the affidavit of defense counsel A-57-60).

Petitioners erroneously state that "Barbara Capton did not introduce evidence that any person had ever been injured due to the application of excess force by a member of the

Niagara Falls Police Department". Exhibits 5-23 and 26-28, 30-33, 35, 37-39, 42-45, 47-48, 50, 88 all allege allegations of excessive and unreasonable force, frequently causing fractures, lacerations, head injuries and loss of consciousness, among other things. In particular, Exhibits 26 and 27 (pp. 54-109 in the Exhibit Volume submitted to the Court of Appeals) relate to the Notice of Claim of the police chief's own son, Michael Zwelling, and the resultant investigation into use of excessive force. In that instance, complaints of excessive force against police officers were verified by objective eyewitness statements supplied by eight civilians, who confirmed significant acts of the use of excessive force by police officers. There was, as usual, no determination made of even one solitary act of wrongdoing by any policeman involved, and no corrective measure was taken. There was never any follow-up communication with any complainant. Where invariably nothing was ever done, a clear message was set to officers — there was no restraint on their conduct.

In essence, because Petitioners never made any effort to assess the truth of the allegations contained in virtually all accusations of excessive force, the jurors were instructed by the court not to attempt to assess the truth either, but rather to focus on whether the failure to investigate properly or at all, or to discipline where appropriate, had been established so they could determine whether that constituted a policy of deliberate indifference to Respondent's constitutional rights.

Although the Petitioners correctly point out that the City and Chief Zwelling moved for a directed verdict during trial pursuant to FRCP 50(a), that motion was narrowly based upon Respondent's alleged failure to interpose any "testimony during the trial concerning any use of force and

none of the complaints submitted had anything to do with any use of force *during custody*" (emphasis added A-67).

In its Post-Trial Decision and Order, contrary to Petitioners' interpretation, the District Court did address the issue as to whether there had been sufficient and appropriate proof submitted by Respondent to justify the jury verdict. Like the jury before him, Judge Skretny recognized that (a) the evidence supported the notion that there had been many, many accusations of excessive force made against members of the Niagara Falls Police Department in the past, which the defendant Laurel Sheehan was aware of; (b) the defendant Laurel Sheehan was also aware that no one had ever been disciplined; (c) that a climate which appeared to condone use of excessive force had been permitted to flourish, due to the Department's custom or practice of systematic inaction (Post Trial Decision and Order, A-22-24, A26-27).

Whether any actual prior civil rights violations needed to be established is an issue (a) that has been clearly addressed by the District Court and the Court of Appeals; and (b) is irrelevant based on the Respondent's theory of recovery under Section 1983 and validated by the District Court, the Court of Appeals and the jury.

B. By reinstating the punitive damages award against Police Chief Zwelling, the Court of Appeals properly refused to require the literal personal involvement by supervisors to justify a punitive award under 42 U.S.C. § 1983.

Although the District Court vacated the punitive claim against Chief Thomas Zwelling but upheld the punitive award against Laurel Sheehan, Judge Skretny stated in his Decision

and Order that "defendant's motion attacking the punitive damages verdict (against Zwelling) is a much closer call" (A-27). Contrary to Petitioners' position, the jury instruction relating to punitive damages did *not* contain express language requiring that Chief Zwelling manifest a negative animus towards Barbara Capton personally. The jury was invited to determine if Barbara Capton had proven that any of the defendants had acted with (a) malicious intent to violate her rights; or (b) callous or reckless disregard of her rights (A-75).

Despite the fact that the Court of Appeals bluntly stated that the defendants' appellate arguments did not offer a convincing rationale for the notion that the "deliberate indifference" compensatory standard found by the jury is somehow a lesser standard of culpability than the "callous indifference" punitive standard, Petitioner again seeks to deny justice to Barbara Capton by delaying it unnecessarily.

Petitioners' blatantly ignore the fact that Barbara Capton, a veritable ninety-eight pound model citizen with no arrest record who was handcuffed and was proven to have posed absolutely no risk of harm or escape that morning, was manhandled by Laurel Sheehan as though she presented the persona of a Balkan terrorist.

REASONS FOR DENYING THE WRIT

The petition's fact bound claim that the courts below either violated Supreme Court precedent or disregarded Respondent's evidentiary failures does not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged.

1. Petitioner mistakenly relies on *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). In *Brown*, the Supreme Court had its first confrontation with a Section 1983 municipal liability, deficient hiring claim. The Court's 5-4 decision established strict fault and causation standards for cases in which the plaintiff seeks to establish municipal liability based on the deficient hiring of a constitutional tortfeasor. In these cases, the plaintiff must demonstrate that the hired officer "was highly likely to inflict the 'particular injury suffered by the plaintiff'." 117 S. Ct. at 1392.

In *Brown*, Deputy Burns, after a high speed chase, pointed his gun at the Brown vehicle and ordered Mr. and Mrs. Brown out of the vehicle and to raise their hands. When she did not exit, the Deputy used an arm bar technique, grabbing her arm at the wrist and elbow, pulling her from the vehicle and spinning her to the ground, allegedly causing knee injuries and subsequent surgery. The plaintiff argued that the County should be held liable for the Deputy's use of excessive force because his supervisor, Sheriff Moore, had not closely reviewed the Deputy's driving record and prior criminal history that included driving infractions and misdemeanor convictions for assault and battery, resisting arrest and public drunkenness.

The critical issue in the *Brown* case was whether the Sheriff's failure to effectively screen the record of an applicant for law enforcement employment justified the imposition of Section 1983 liability on the County. The bare majority of this Court held that it did not.

The Petitioners fail to recognize that the plaintiff in *Brown*, unlike Barbara Capton, did not rely upon a persistent

custom or practice but rather asserted that the Sheriff's *single decision* to hire the deputy set the wheels in motion that led to the alleged deprivation of her federally protected rights. The majority found the requisite level of culpability and causation required by Section 1983 to be lacking.

In essence, the decision in *Brown* requires that where a plaintiff relies upon proof of a single instance of inadequate screening to establish liability under Section 1983, that litigant is required to meet a significant and demanding burden of proof of municipal involvement. In a loose sense, every violation of a federally protected right is attributable to the municipality's decision to hire the constitutional wrongdoer. Imposing liability on this basis, however, becomes dangerously close to *respondeat superior* liability. The issue is whether there is a sufficiently direct link between the deficiencies associated with the hiring decision and the violation of the plaintiff's federal rights.

The *Brown* court held that this link is normally far too tenuous in hiring cases, especially in a case involving a single instance of inadequate screening. The court in *Brown* therefore stressed "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee" 520 U.S. at 405 (citing *inter alia*, *City of Canton v. Harris*, 489 U.S. at 391, 109 S. Ct. 1589, 103 L. Ed. 2d 412 (1989)). A 1983 claimant under the *Brown* decision who alleges such a claim shoulders an even more demanding burden of proof than in a training claim, as the court saw important distinctions between hiring and training claims.

In some circumstances, failing to adequately train law enforcement officers about how to handle recurring situations

will predictably cause violations of federally protected rights. The high level of predictability could justify inferences that the specific training deficiency reflected deliberate indifference and directly caused the deprivation of the plaintiff's federally protected rights. A hiring decision is different for the reasons above stated. In *Brown*, it was stated as follows:

> Predicting the consequences of a single hiring decision, even when based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties. . . . The fact that inadequate scrutiny of an applicant's background would make a violation of rights more likely cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a Constitutional violation. After all, a full screening of an applicant's background might reveal no cause for concern at all; if so, a hiring official who failed to scrutinize the applicant's background cannot be said to have consciously disregarded an obvious risk that the officer would subsequently inflict a particular Constitutional injury.

117 S. Ct. at 1392.

Petitioners have seized upon the use of the phrase "a new standard" as discussed by Justice Souter in his dissenting opinion. *Brown*, 520 U.S. at 422. Justice Souter merely opined that the Court's definition of "deliberate

indifference" for hiring claims appears to be even higher than the standard for "reckless" fault in criminal law. The *Brown* case makes clear that inadequate screening claims are far more difficult to prove than inadequate training claims. It has no relevance to a case as dissimilar factually as the present case.

The facts in the *Brown* case are of course markedly distinguishable from the facts in this case where municipal decision makers, including Chief Zwelling, knew or should have known that the custom and practice in the Niagara Falls Police Department, as it related to continual non-investigation of allegations of excessive police force, would fail to prevent improper and tortious conduct by some members of the force. Therein lies the rub, and thereby is established the reckless conscious disregard for the consequences of their action, in other words, the "deliberate indifference" necessary to trigger municipal liability. *See Brown*, 520 U.S. at 407, citing *City of Canton*, 489 U.S. at 390, n.10.

What Petitioners seem unable to grasp is that Respondent's allegations of unconstitutional activity do not have to flow from prior acts of excessive force adjudicated to be such. The unconstitutional activity or deliberate indifference to Respondent's constitutional rights flows from the repeated and willful failure of the Niagara Falls Police Department and its policymakers to either investigate or discipline properly, or in many instances at all, the multiple allegations of excessive force against its police. The proof at trial adduced that this custom and practice existed over a period of many years, and that Laurel Sheehan knew it. As a result, she enjoyed *carte blanche* insofar as her treatment of arrestees was concerned, and the official *laissez faire* attitude bred abuse.

If the Petitioners' argument is advanced to its logical conclusion, then police departments like that in Niagara Falls would be effectively insulated from excessive force claims by way of a systemic, institutional failure to investigate and document any underlying claims, thereby making it all but impossible for an injured claimant to establish prior specific constitutional violations.

City of Canton held that a municipal policy giving rise to liability under Section 1983 may be inferred even when the policymaker has failed to act affirmatively, so long as a need to control the agents of the municipality "is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need". *City of Canton*, 109 S. Ct. at 1205.

Petitioners likewise ignore the thrust of *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) where this Court stated that a municipality may be held liable for acts taken pursuant to a "policy" by inference from the decisions or non-decisions of those officials whose acts may fairly be said to be those of the municipality. There is no dispute that Chief Zwelling possessed the power to conduct a thorough internal investigation in order to determine the validity of complaints and claims and impose an appropriate penalty whenever warranted.

In *Fiacco v. City of Rensselaer, et al.*, 783 F.2d 319 (2d Cir. 1986), *cert. denied*, 480 U.S. 922, 107 S. Ct. 1384, 94 L. Ed. 2d 698 (1987), the Second Circuit determined that the trial court correctly ruled that the claim under Section 1983 that a plaintiff's injuries resulted from a municipal policy of non-supervision of its police officers was a

legitimate jury question under the Federal Statute. To the same effect, *see Vann v. City of New York*, 73 F.3d 1040 (2d Cir. 1995).

In *Fiacco*, the Second Circuit stated at 783 F.2d 326:

> First, Fiacco's theory is not that the City intended to engage in intentional conduct. Rather it is that the City was knowingly and deliberately indifferent to the possibility that its police officers were wont to use excessive force and that this indifference was demonstrated by the failure of the City defendants to exercise reasonable care in investigating claims of police brutality in order to supervise the officers in the proper use of force. We see no logical flaw in such a hypothesis, and we reject the notion advanced by the City defendants that a municipality may not be held liable under Section 1983 on the basis of a policy of deliberate indifference to the constitutional rights of persons within its domain.

The Court then stated further, at 783 F.2d 327:

> A municipality that has the responsibility to keep order and to protect the rights of those within its boundaries to be free from physical violence gives the policemen considerable power to subdue persons who would violate those rights. It cannot responsibly condone police officers' use of that power in a way that is itself lawless. It should not take a *laissez-faire* attitude toward the violation by its police officers of the very rights that they are supposed to prevent others from violating. A

> principle that would give a municipality immunity from Section 1983 liability for injury caused by its deliberate indifference to the police officers' use of excessive force in violation of constitutional principles would foster the denial — both by policemen and by civilians — of the very rights the City is responsible for safeguarding.

2. The jury was instructed that to establish a claim under Section 1983, the plaintiff must show that the defendants acted intentionally or recklessly (Special verdict form and interrogatories A-71-77). The jury was instructed that punitive damages were appropriate if they found the defendant acted with reckless disregard of the plaintiff's rights. The instant case presents a situation with a standard for compensatory liability that is as high as the usual threshold for an award of punitive damages. In *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1985), the Supreme Court stated that "in torts like malicious prosecution that require a particular anti-social state of mind, a proper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages". *Smith* at 461 U.S. 53. The underlying standard for both compensatory damages and punitive damages is a recklessness and a callousness which was found by the jury to be present.

The *Smith* court pointed out, however, that even though there was no substantial difference between the standards for liability in such claims for punitive and compensatory damages, punitive damages are not equally available and are never awarded as a matter of right. The claimant not only has to meet the threshold showings of callousness and/or

recklessness, but also must merit in the jury's eyes a separate discretionary moral judgment. *Id.* at p. 51. "To put it differently, society has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault". *Id.* at pp. 54-55.

There is clearly no societal interest served in shielding the exercise of a police chief's discretion when the use of that discretion results in reckless or callous indifference to the rights and safety of those in custody. *Id.* at p. 55. *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 616 (1981).

Under common law as expressed in the Restatement of Torts, Second, actual intent was not required for punitive damages. A claimant under Section 1983 should not have a more restrictive and imposing burden.

In *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), it was observed that the standard for compensatory damages overlaps liability for punitive damages to the extent that both require a finding of reckless or callous disregard or indifference to the complainant's constitutional rights. As in *Larez*, it was apparently impossible for a police officer in the Niagara Falls Police Department to suffer discipline as a result of a complaint logged by a citizen, and that the Police Department's disciplinary and complaint practice contributed to the use of excessive force because the procedures made clear to officers that even in the presence of independent third-party witnesses, they could get away with anything.

As stated by the First Circuit Court of Appeals in *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989), *cert.*

denied, 493 U.S. 820, 110 S. Ct. 75 (1990), which upheld the jury's imposition of punitive damages against the Mayor and Police Chief,

> an unbridled use of force was an almost certain consequence of a police department that acquiesced in unconstitutional arrest practices and had a policy which provided no training or guidelines on the modern standards governing arrest or the use of force, inadequate training of its command officers and supervisor of its inferior officers, and little or no discipline of police misconduct.

(871 F.2d at 1163).

Contrary to Petitioners' "statement of facts" in its petition (A-15), the jury was *not* instructed that a punitive award required that heightened wrongful conduct be particularly directed at Barbara Capton. The Second Circuit rightfully corrected the District Court in recognizing that the compensatory damages standard of "deliberate indifference" is no less blameworthy or culpable than the "callous indifference" required in punitive damages. The Court of Appeals recognized that even though Chief Zwelling was not physically involved in the assault upon Barbara Capton, his involvement was deeper and more persuasive. His "head in the sand" approach to one of his most important administrative functions, policing the police, created the atmosphere that resulted in the assault that fateful morning. As such, he was a vital accomplice to Laurel Sheehan's brutality.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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